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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEDA ATANASOSKA and DENIS PAULCE, on behalf of themselves and others similarly situated,

Plaintiffs,

– against –

365 SEKI, INC., NEW LIFE SUSHI, INC., SEKI, INC. d/b/a/ SUSHI SEKI, MICHELLE SEKI, and JIMMY SEKI,

Defendants.

ORDER

16 Civ. 1217

Ramos, D.J.:

Neda Atanasoska and Denis Paulce ("Plaintiffs") brought the above-captioned action on behalf of themselves and others similarly situated[1] against 365 Seki Inc., New Life Sushi, Inc., Seki Inc. d/b/a/ Sushi Seki, Michelle Seki, and Jimmy Seki ("Defendants") for recovery related to unpaid or misappropriated tips and wage notice violations under the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). *See* Doc. 1. Plaintiffs have submitted an application for the Court to approve the parties' Settlement Agreement and General Release ("Agreement") and to dismiss this action with prejudice. Doc. 27. In this Circuit, parties cannot privately settle FLSA claims with prejudice absent the approval of the district court or the Department of Labor. *See Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 200 (2d Cir. 2015). The parties therefore must satisfy the Court that their agreement is "fair and reasonable." *Beckert v. Ronirubinov*, No. 15 Civ. 1951 (PAE), 2015 WL 8773460, at *1 (S.D.N.Y. Dec. 14, 2015). The Court will not approve the Agreement as currently drafted for the reasons described

[1] The parties settled this action with respect to the named Plaintiffs before any certification motions were made.

below.

"In order to evaluate the fairness of a proposed settlement, the parties must provide the court with enough information to evaluate 'the bona fides of the dispute.'" *Gaspar v. Pers. Touch Moving, Inc.*, No. 13 Civ. 8187 (AJN), 2015 WL 7871036, at *2 (S.D.N.Y. Dec. 3, 2015). The Court's inquiry into the substantive reasonableness of a FLSA settlement requires the parties to submit, among other things, a comparison of Plaintiffs' range of possible damages with the final settlement amount, and an explanation of the case-specific litigation risks and other factors that justify the discrepancy between the potential value of Plaintiffs' claims and the settlement amount, if any. *See, e.g.*, *Jesus v. PS Bros. Gourmet*, No. 15 Civ. 99 (WHP), 2015 WL 9809999, at *1 (S.D.N.Y. Dec. 18, 2015) (approving FLSA settlement where plaintiff submitted "a detailed breakdown of the total damages assessed for minimum wage, overtime, and spread-of-hours violations; New York and federal liquidated damages; interest; and pay stub violation"); *Meza v. 317 Amsterdam Corp.*, No. 14 Civ. 9007 (VSB), 2015 WL 9161791, at *1 (S.D.N.Y. Dec. 14, 2015) (approving settlement after parties "submitted a letter detailing why they believe the settlement reached in this action, and the contemplated attorney's fees, are fair and reasonable").

The Agreement provides for a total settlement of $47,000 and divides the settlement as follows:

(1) $15,440.77 payable to Neda Atanasoska consisting of $2,619.91 as wages and $12,820.86 as payment in lieu of liquidated or statutory damages and interest;

(2) $15,440.77 payable to Denis Paulce consisting of $2,140.45 as wages and $13,300.32 as payment in lieu of liquidated or statutory damages and interest; and

(3) $16,118.46 in attorneys' fees and legal costs to be paid to Plaintiffs' counsel, Joseph &

Kirschenbaum LLP.

Doc. 27, Exhibit 1 ("Agreement") ¶ 1.

The Court is satisfied that the parties have adequately justified the dollar amounts constituting the settlement. Here, based on Plaintiffs' calculations, the maximum damages Plaintiff Atanasoska could recover on her wage and notice claims are $13,389.82, which consists of $1,674.91 for unpaid tip credit, $945 for misappropriated tips, $2,619.91 for liquidated damages on the unpaid tip credit and misappropriated tips, and $8,150 for wage notice violations. *See* Doc. 27 at 2. The maximum damages Plaintiff Paulce could recover on his wage and notice claims are $12,180.90, which consists of $1,270.45 for unpaid tip credit, $870 for misappropriated tips, $2,140.45 for liquidated damages on the unpaid tip credit and misappropriated tips, and $7,900 for wage notice violations. *See* Doc. 27 at 2. Thus, the maximum potential damages for the wage and notice claims for both Plaintiffs are $25,570.72. *Id.* However, this number is subject to potential reduction because Defendants may be able to establish that Plaintiffs were paid more than the tip credit minimum wage on certain weeks, which would reduce their tip credit damages. *Id.* The parties also dispute whether the alleged ineligible tip pool participant at issue had sufficient managerial authority to render him ineligible to receive tips and whether Plaintiffs would prevail on their retaliation claims. *Id.* The Court finds that this explanation of how the payments have been reduced to account for litigation risks and potential defenses is reasonable.

Additionally, after the parties engaged in discovery and both Plaintiffs were deposed, the parties attended a mediation with Mediator Laurence Silverman through the Southern District of New York's mediation program. *See* Doc. 24; Doc. 27 at 2. At the mediation, the parties agreed to settle the case for $47,000. *See* Doc. 27 at 2. Thus, the settlement was the result of arm's length negotiation reached with the assistance of an experienced mediator. Accordingly, the Court is satisfied with the fairness of the negotiations and the formula for calculating the settlement amount.

Regarding the reasonableness of attorneys' fees requested, the Court looks to "the lodestar-the product of a reasonable hourly rate and the reasonable number of hours required by the case–which creates a presumptively reasonable fee." *Zhang v. Lin Kumo Japanese Rest., Inc.*, No. 13 Civ. 6667 (PAE), 2015 WL 5122530, at *2 (S.D.N.Y. Aug. 31, 2015) (quoting *Stanczyk v. City of New York*, 752 F.3d 273, 284 (2d Cir. 2014)). Under the proposed Agreement, Plaintiffs' attorneys will retain one third of the settlement amount, totaling $15,440.67, plus $677.79 as reimbursement for costs associated with the filing fee and service of the complaint. Agreement ¶ 1.[2] In line with the requirements for FLSA settlement approval in this Circuit, Plaintiffs' counsel has submitted billing records detailing the type of work performed and hours logged by each attorney or staff member in this matter so that the Court may calculate reasonable fees under the "lodestar" method. *See Garcia v. Jambox, Inc.*, No. 14 Civ. 3504 (MHD), 2015 WL 2359502, at *6 (S.D.N.Y. Apr. 27, 2015) ("In this circuit, a proper fee request entails submitting contemporaneous billing records documenting, for each attorney, the date, the hours expended, and the nature of the work done. That requirement extends to parties seeking approval of a settlement that allocates a portion of the proceeds to the attorney."); *see also Beckert*, 2015 WL 8773460, at *2 (evaluating the reasonableness of plaintiff's request for fees of one third of the settlement amount by reviewing the reasonable hours worked multiplied by reasonable hourly rates, *i.e.* the lodestar method).

Here, Plaintiffs' counsel's lodestar calculation is $23,147.50, totaling 75.9 hours of attorney and staff work. *See* Doc. 27, Exhibit 3 at 4. This work includes intake, drafting demand letters, drafting and filing the complaint, written discovery, preparing for and attending depositions and mediation, and negotiating and drafting the settlement agreement. *See id.* The Court is satisfied with the billing rates counsel assigned to each biller, which have been approved by another Court in this District. *See* Doc. 27 at 4n.3. Based on these sums, the Court finds that the requested attorneys' fees and costs of $16,118.46 are objectively reasonable.[3]

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[2] "One-third contingency fees . . . are commonly accepted in the Second Circuit in FLSA cases." *Najera v. Royal Bedding Co., LLC*, No. 13 Civ. 1767 (NGG) (MDG), 2015 WL 3540719, at *3 (E.D.N.Y. June 3, 2015).

In terms of the non-monetary provisions, Plaintiffs argue that the mutual non-disparagement clause includes a carve-out that makes such a provision appropriate under case law in this District. *See* Doc. 27 at 3. The Court agrees. The Agreement contains a non-disparagement provision, and an exception to the provision that states, "Nothing in this Paragraph ... is intended to limit truthful statements or information required to be provided by court order of subpoena." Agreement ¶ 6(c). Thus, the carve-out for disparaging remarks does not prevent the dissemination of truthful information, including information about the basis for this action. *See Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 180 n.65 (S.D.N.Y. 2015) (noting that if a non-disparagement clause "would bar plaintiffs from making 'any negative statement' about the defendants, it must include a carve-out for truthful statements about plaintiffs' experience litigating their case" or else it would "contravene[] the remedial purposes of the [FLSA]").

Additionally, the Agreement also contains mutual general releases. As part of the

[3] The Court cautions Plaintiffs' counsel, however, that a number of the entries in the billing records are vague, and because of this vagueness, the Court deducts this time from Plaintiffs' counsel's total lodestar calculation of $23,147.50. *See Zhang*, 2015 WL 5122530, at *3 ("[A]ssociate Ben Federici billed 0.30 hours for '[r]eceived and responded to email.' Because of the vagueness of this entry, the Court also deducts this time from plaintiffs' counsel's lodestar calculation."). Here, as in *Zhang*, at least one entry simply states "emails," and others state "review documents" without more specifics. Nonetheless, even adjusting for the vague entries—which account for only a fraction of the total time worked—the Court finds the proposed attorneys' fees—$15,440.67 in fees plus $677.79 as reimbursement of costs—reasonable and well below the lodestar calculation.

Settlement, Plaintiffs are required to waive essentially all claims that may have arisen out of their employment with Defendants. Specifically, the Agreement requires Plaintiffs to release Defendants and their agents "from all actions, claims, demands, losses, expenses, obligations and liabilities related to any conduct or activity occurring before the Effective Date hereof . . ." Agreement ¶ 2. This provision is "too sweeping to be 'fair and reasonable'" and must be rejected. *Flood v. Carlson Restaurants Inc.*, No. 14 Civ. 2740 (AT), 2015 WL 4111668, at *2 (S.D.N.Y. July 6, 2015). "Courts in this District routinely reject release provisions that 'waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues.'" *Martinez v. Gulluoglu*, 2016 WL 206474, at *2 (S.D.N.Y. Jan. 15, 2016) (quoting *Nights of Cabiria*, 96 F. Supp. 3d at 181). A number of judges in this District refuse to approve any FLSA settlement unless the release provisions are "limited to the claims at issue in this action." *Lazaro-Garcia v. Sengupta Food Servs.*, No. 15-CV-4259 (RA), 2015 WL 9162701, at *2 (S.D.N.Y. Dec. 15, 2015) (collecting cases).

While it is true that judicial disfavor of broad releases is especially pronounced where "the releases were not mutual and protected only the defendants," *Lola v. Skadden, Arps, Meagher, Slate & Flom LLP*, 13 Civ. 5008 (RJS), 2016 WL 922223, at *2 (S.D.N.Y. Feb. 3, 2016), the fact that the general release is styled as a mutual release does not salvage it "absent a sound explanation for how this broad release benefits the Plaintiff employee[s]." *Gurung v. White Way Threading LLC*, No. 16 Civ. 1795 (PAE), 2016 WL 7177510, at *2 (S.D.N.Y. Dec. 8, 2016). Several courts in this District have permitted general releases so long as they are mutual. *See Souza v. 65 St. Marks Bistro*, 15 Civ. 327 (JLC), 2015 WL 7271747, at *5–7 (S.D.N.Y. Nov. 6, 2015); *Lola*, 2016 WL 922223, at *2; *Cionca v. Interactive Realty*, LLC, 15 Civ. 5123 (BCM), 2016 WL 3440554, at *3–4 (S.D.N.Y. June 10, 2016). However, in the decisions the Court finds most persuasive, courts have rejected mutual general release provisions. *See Gurung*, 2016 WL 7177510, at *2 (S.D.N.Y. Dec. 8, 2016) (rejecting mutual general release because "[t]his Court, too, is concerned that despite the formal reciprocity of such releases, their practical effect in some cases may be lopsided because they may stand to benefit only the employer defendant, who realistically may be less likely than the employee plaintiff to have latent claims against its adversary"); *Johnson v. Equity Leasing Fin. II, Inc.*, No. 16 Civ. 1454 (WHP), 2016 WL 6493157, at *1 (S.D.N.Y. Oct. 4, 2016) (rejecting mutual general release because "parties have every right to enter a settlement that waives claims relating to the underlying action in exchange for a settlement payment" but may not "erase all liability whatsoever in exchange for partial payment of wages allegedly required by statute") (quoting *Nights of Cabiria*, 96 F. Supp. 3d at 181); *Flores–Mendieta v. Bitefood Ltd.*, 15 Civ. 4997 (AJN), 2016 WL 1626630, at *2 (S.D.N.Y. April, 21, 2016) (rejecting mutual general release because "the Court cannot 'countenance employers using FLSA settlements to erase all liability whatsoever in exchange for ... payment of wages allegedly required by statute'") (quoting *Nights of Cabiria*, 96 F. Supp. 3d at 181).

As in *Gurung*, the benefit to Plaintiffs from the broad mutual release is "elusive" because the Agreement "does not reveal, and the parties have not proffered, any claim that [Defendants] could have had against [Plaintiffs], or any other benefit to [Plaintiffs] from foregoing all potential claims against [Defendants]." 2016 WL 7177510, at *2. Thus, the release—although it appears mutual in form—appears one sided in actuality and is not materially different than provisions that courts in this District have held impermissible. Accordingly, the Court will not approve the Agreement as written.

Apart from the mutual release provision discussed above, the Court finds the Agreement to be fair and reasonable. The parties may proceed in one of the following ways:

1. File a revised settlement agreement on or before **March 13, 2017** that cures the issue with the general mutual release, or alternatively provides a persuasive explanation of the practical benefit that Plaintiffs stand to realize in exchange for broadly releasing all claims against the Defendants.

2. File a joint letter on or before **March 13, 2017** that indicates the parties' intention to abandon settlement and continue to trial, at which point the Court will reopen the case and set down a date for a pre-trial conference; or

3. Stipulate to dismissal of the case *without* prejudice, which the Court need not approve under current Second Circuit case law, *see Cheeks*, 796 F.3d at 201 n.2.

It is SO ORDERED.

Dated: February 27, 2017
New York, New York

Edgardo Ramos, U.S.D.J.